Supreme Court, U.S.
FILED
DEC 2 3 2003
OFFICE OF THE CLERK

No. 03-433

In the Supreme Court of the United States

ALCAN ALUMINUM CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA;
STATE OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

KENNETH W. STARR
ROBERT R. GASAWAY
KANNON K. SHANMUGAM
JOSEPH A. EISERT
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000

ROBERT H. BORK
6250 Ridge Street
McLean, VA 22101
(703) 288-1174

LAWRENCE A. SALIBRA, II
Counsel of Record
JOHN C. TILLMAN
MARK D. KINDT
ALCAN CORPORATION
6060 Parkland Boulevard
Mayfield Heights, OH 44124
(440) 423-6918

WILLIAM S. SESSIONS
HOLLAND & KNIGHT LLP
2099 Pennsylvania Avenue, N.W.
Washington, DC 20006
(202) 955-3000

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

REASON FOR GRANTING THE WRIT 2

THE SECOND CIRCUIT ERRED ON TWO CERCLA QUESTIONS OF EXCEPTIONAL IMPORTANCE. 2

A. The Second Circuit Erred By Imposing CERCLA Liability For Disposing Of Waste Even If It Contains Only Below-Background Levels Of A Manmade Pollutant 3

B. The Second Circuit Erred By Imposing Joint and Several CERCLA Liability Merely For Disposing Of Harmless Waste, On The Ground That It Could "Spread" Hazardous Substances In Waste Disposed Of By Others. 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Amoco Oil Co. v. Borden, Inc.,
889 F.2d 664 (5th Cir. 1989) 5, 6

B.F. Goodrich Co. v. Murtha,
958 F.2d 1192 (2d Cir. 1992) 5

Babbitt v. Sweet Home Chapter,
515 U.S. 687 (1995) 2

Commander Oil Corp. v. Barlo Equip. Corp.,
215 F.3d 321 (2d Cir. 2000) 2

Control Data Corp. v. S.C.S.C. Corp.,
53 F.3d 930 (8th Cir. 1995) 10

Eagle-Picher Industries, Inc. v. EPA,
759 F.2d 922 (D.C. Cir. 1985) 5

Licciardi v. Murphy Oil U.S.A., Inc.,
111 F.3d 396 (5th Cir. 1997) 6

Massachusetts v. Blackstone Valley Electric Co.,
67 F.3d 981 (1st Cir. 1995) 5

Solid Waste Agency of N. Cook Cty. v. Army Corps of Eng'rs,
531 U.S. 159 (2001) 2

United States v. Alcan Aluminum Corp.,
964 F.2d 252 (3d Cir. 1992) 5, 8

United States v. Bestfoods,
524 U.S. 51 (1998) 1

Whitman v. American Trucking Assn's, Inc.,
531 U.S. 457 (2001) 2

STATUTES

21 C.F.R. § 109.30 4

OTHER AUTHORITIES

Ted Cilwick,
Big Polluters Find Way to Clean Up the Balance Sheet: Soak the Little Guy,
Salt Lake Trib., Nov. 8, 1992 10

Cathleen Clark,
Should The Butcher, The Baker And The Candlestick Maker Be Held Responsible For Hazardous Waste?,
1994 Utah L. Rev. 871 10

Office of Solid Waste and Emergency Response, EPA,
Role of Background in the CERCLA Cleanup Program,
OSWER 9285.6-07P (Apr. 26, 2002) 4

Sue Reisinger,
Feds Pay in Superfund Lawsuits,
Nat'l Law J., Dec. 1, 2003 1

INTRODUCTION

The federal government's brief in opposition does not seriously defend the two legal holdings underpinning the Second Circuit's decision: its holding that a company may be subject to CERCLA liability for disposing of a substance containing only below-background amounts of manmade pollutants, and its holding that a company may be subject to joint and several CERCLA liability on the ground that even harmless substances, once disposed of, can "spread" the hazardous substances disposed of by others.

Instead, the government repeatedly attempts to portray the decision below as doing no more than affirming factual findings. As the widespread *amicus* interest in this case amply demonstrates, however, nothing could be further from the truth. It is the troubling legal standards employed by the Second Circuit, not any Alcan-specific findings, that threaten to expose companies to crushing liability simply for being so bold as to dispose of harmless substances. Furthermore, even assuming that there are outstanding factual disputes even after the correct legal standards have been determined, as the government contends, those disputes may be resolved on remand, and do nothing to preclude the Court's review at this juncture.

This Court's intervention is urgently needed. The Court has heard only one CERCLA case in the last ten Terms — and that involving an issue of relatively narrow significance. *See United States v. Bestfoods*, 524 U.S. 51 (1998). No one seriously contests that the government is increasingly taking a "very aggressive posture" in CERCLA proceedings. Sue Reisinger, *Feds Pay in Superfund Lawsuits*, Nat'l Law J., Dec. 1, 2003, at 8, 10 (internal quotation omitted). Nor does anyone seriously doubt that a big part of the reason that this Court and the courts of appeals have thus far been unable to develop workable CERCLA standards is that the "inordinate liability and litigation costs associated with defending CERCLA cases," Br. of Washington Legal Foundation *et al.* 20, force many a

defendant to settle even before litigation begins. The lower courts, including the Second Circuit itself, are crying out for guidance on what all agree are the many "ambiguit[ies] within CERCLA's miasmatic provisions." *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 326 (2d Cir. 2000) (Walker, J.). Because this case presents a rare opportunity for the Court to provide such guidance, *certiorari* should be granted.

REASON FOR GRANTING THE WRIT

THE SECOND CIRCUIT ERRED ON TWO CERCLA QUESTIONS OF EXCEPTIONAL IMPORTANCE.

This case raises heretofore-unresolved CERCLA issues of exceptional importance. When viewed against the backdrop of similarly important provisions in *other* environmental statutes, it is remarkable that, in the almost 25 years after CERCLA's enactment, neither this Court nor the government itself has ever given an authoritative interpretation to CERCLA's bedrock provisions (i) defining what constitutes a "hazardous substance" or (ii) specifying when, if at all, generators may be subject to joint and several liability on the ground that harmless wastes they have disposed of might "spread" the hazardous wastes disposed of by others. *Cf., e.g., Whitman v. American Trucking Assn's, Inc.*, 531 U.S. 457 (2001) (interpreting foundational "national ambient air quality standards" provisions of the Clean Air Act); *Solid Waste Agency of N. Cook Cty. v. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (interpreting foundational "navigable waters" provision of Clean Water Act); *Babbitt v. Sweet Home Chapter*, 515 U.S. 687 (1995) (interpreting foundational "take" provisions of the Endangered Species Act). Nor, given the government's "very aggressive posture" in CERCLA proceedings and the "inordinate liability and litigation costs" associated with defending CERCLA cases, is this Court likely to have such an opportunity again in the near future. *Certiorari* is accordingly warranted.

A. The Second Circuit Erred By Imposing CERCLA Liability For Disposing Of Waste Even If It Contains Only Below-Background Levels Of A Manmade Pollutant.

1. The government's brief never comes to grips with Alcan's fundamental argument in favor of *certiorari*: namely, that there is an urgent need for a workable definition of what constitutes a "hazardous substance" for purposes of imposing CERCLA liability. As noted in the petition, the government can, and does, effectively give this key statutory term an absurd meaning. *See* Pet. 6-11. Remarkably, the government does not deny that, because virtually *all* material contains below-background amounts of manmade hazardous substances, its reading of the statute would afford the government unfettered discretion to decide whom to prosecute for CERCLA liability.

2. The government makes only halfhearted efforts to defend the Second Circuit's holding that generators are exempt from CERCLA liability in cases in which their waste contains below-background levels of *naturally occurring* hazardous substances, but not in cases in which their waste contains below-background levels of *manmade* substances. *See* Opp. 14-15. Specifically, the government does not challenge — at least not expressly — the Second Circuit's earlier holding in this case that an exemption is appropriate in cases involving trace levels of naturally occurring hazardous substances. *See* 990 F.2d 711, 722 (2d Cir. 1993). But it nevertheless defends the Second Circuit's refusal in its opinion below to *extend* this exemption to manmade hazardous substances — by merely quoting the Second Circuit's *ipse dixit* assertion that its original exemption was limited to naturally occurring substances. Opp. 15 (quoting Pet. App. 10a).

The government does effectively concede that "manmade chemicals * * * are also present, in small amounts, throughout the environment." *Id.* This effective concession is unsurprising, for it reflects acknowledgments already made by

the EPA in its internal policy documents on CERCLA remediation, *see* Office of Solid Waste and Emergency Response, EPA, *Role of Background in the CERCLA Cleanup Program*, OSWER 9285.6-07P, at 7 (Apr. 26, 2002), and by at least one other federal agency in a regulation setting tolerable levels of PCBs — the particular pollutant at issue here, *see* 21 C.F.R. § 109.30(a). But even if those statements "do[] not address the scope of CERCLA liability," Opp. 15 n.4 — and we have never contended that they do — they demonstrate that there is no justification for treating manmade substances differently from naturally occurring ones, since both have "background" levels. The only logical conclusion, therefore, is *either* (i) that CERCLA liability should attach whenever waste contains only below-background levels of naturally occurring *or* manmade hazardous substances (a position, again, that the government does not expressly embrace), *or* (ii) that CERCLA liability should *not* attach when waste contains only below-background levels of naturally occurring *or* manmade hazardous substances (as we contend). In either case, the Second Circuit's decision misstates the rule — and *certiorari* is appropriate to determine the correct rule.

3. The government does suggest that "[c]ourts have consistently held that CERCLA's definition of hazardous substance does not include a '[q]uantity or concentration' requirement," *id.* at 4, and that "courts have * * * concluded, without exception, that CERCLA liability may arise from the improper disposal of wastes containing small amounts of hazardous substances," *id.* at 13. But the circuit decisions the government cites in this regard do nothing to undermine the critical proposition asserted by Alcan: namely, that CERCLA liability should not attach when waste contains only below-background trace *concentrations* of hazardous substances.

For example, although the Second Circuit, in its earlier opinion in this case, did state that "'[q]uantity or concentration is not a factor'" in the statutory *definition* of "hazardous

substance," 990 F.2d at 720 (quoting *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1200 (2d Cir. 1992)), it of course recognized an exemption from *liability* for waste containing trace concentrations of naturally occurring hazardous substances, *see id.* at 722. Similarly, the Third Circuit has recognized only that "CERCLA liability does not depend on the existence of a *threshold quantity* of a hazardous substance" — not that CERCLA liability *ultimately* attaches even when waste contains only a trace *concentration* of a hazardous substance. *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 260-61 (3d Cir. 1992) (emphasis added). Finally, the Fifth Circuit, while likewise recognizing that the "plain statutory language fails to impose any quantitative requirement," expressly *rejected* the proposition that "CERCLA liability attaches upon the release of *any* quantity of a hazardous substance," reasoning that such an interpretation would "permit CERCLA's reach to exceed its statutory purposes by holding parties liable who have not posed any threat to the public or the environment." *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 669-70 (5th Cir. 1989).[1]

4. The government's attempts to distinguish the circuit decisions cited in the petition, *see* Opp. 16-17, are likewise unavailing. As to the First Circuit's decision in *Massachusetts v. Blackstone Valley Electric Co.*, 67 F.3d 981 (1995), the government claims that the decision stands only for the proposition that "it was not sufficient that [ferric ferrocyanide] falls within a general category of 'cyanides' listed under the Clean Water Act; rather * * * the substance must be more specifically identified in one of the lists of hazardous substances

---

[1] The D.C. Circuit's decision in *Eagle-Picher Industries, Inc. v. EPA*, 759 F.2d 922 (1985), is distinguishable. The issue in that case was whether mining wastes and fly ash could constitute "hazardous substances" notwithstanding the suspension of regulation of those substances under the Solid Waste Disposal Act. *See id.* at 926-27. The court held that they could, but only on the narrow factual basis that the petitioners failed to demonstrate that all or virtually all mining waste and fly ash contained only trace amounts of hazardous substances. *See id.* at 928.

that Section 101(14) of CERCLA incorporates by reference." Opp. 17 (citing 67 F.3d at 984-85). The cited portion of the First Circuit's decision, however, merely summarizes the statutory scheme and the district court decision that was under review. And in any event, the government's characterization of the First Circuit's holding is inaccurate. Far from holding that ferric ferrocyanide could not constitute a "cyanide" and thus a CERCLA-regulated "hazardous substance," the court merely rejected the EPA's "total cyanide" test for determining whether ferric ferrocyanide *did* constitute a regulable "cyanide," *see Blackstone*, 67 F.3d at 988-91, and referred the case back to the EPA for a new determination, *see id.* at 993. In doing so, the court reasoned that the EPA's "total cyanide" test could lead to "nonsensical results" because many everyday substances contain cyanide molecules. *Id.* at 989-90. It added that such a test would be "untenably overinclusive" because it would sweep in substances that "no one, including the EPA, would categorize * * * [as] within the meaning of * * * CERCLA." *Id.* at 990. The First Circuit's decision is plainly in tension with the decision below, which would bring innocuous substances such as milk and rainwater within CERCLA's ambit.

As to the Fifth Circuit's decision in *Licciardi v. Murphy Oil U.S.A., Inc.*, 111 F.3d 396 (1997), the government contends that the decision held only that "[the plaintiff] presented 'no evidence that the found "release" justified the response costs.'" Opp. 17 (quoting 111 F.3d at 399). Two sentences earlier in the opinion, however, the court reiterated its earlier holding from *Amoco Oil* that "liability does not attach to the release of '*any* quantity of a hazardous substance.'" 111 F.3d at 399 (quoting *Amoco Oil*, 889 F.2d at 670-71); *see also id.* at 398 (same). Contrary to the government's suggestion, therefore, *see* Opp. 17, the Fifth Circuit did indicate that a company could not be held liable under CERCLA for disposing of *de minimis* amounts of hazardous substances. The Fifth Circuit's decision in *Licciardi*, like the First Circuit's decision in *Blackstone*, is in

tension with the decision below.

5. In the end, the government is left only with the weak suggestion that Alcan presented insufficient evidence below to establish that its emulsion contained below-background concentrations of PCBs. *See* Opp. 15-16, 19. That suggestion is not only inaccurate, in light of the unrebutted (and unobjected-to) evidence introduced by Alcan at trial, *see, e.g.*, C.A. App. 1196, but also irrelevant. Precisely because of its holding that CERCLA liability attaches even when waste contains below-background levels of manmade hazardous substances, the district court made no factual finding as to the level of PCBs in Alcan's emulsion, concluding only that the government established that Alcan's emulsion contained *some* level of PCBs. *See* Pet. App. 50a. The Second Circuit agreed. *See id.* at 9a-10a. Indeed, if the courts below had concluded, as a factual matter, that there *were* above-background PCB levels in Alcan's emulsion, they would have had no need to reach the *legal* question whether CERCLA liability attaches to disposals of below-background levels of manmade hazardous substances.

To the extent that there are any factual disputes as to whether Alcan's emulsion contained below-background levels of PCBs — and it is Alcan's view that there is not, *see* Pet. 12 — those disputes could and should be resolved on remand after this Court establishes the correct legal standards.[2] Critically, the burden of proof on the threshold question of whether a generator disposed of covered "hazardous substances" — unlike

---

[2] Significantly, it is undisputed that the government presented no evidence below as to the quantity of PCBs in Alcan's emulsion, but only evidence that PCB contamination was subsequently found at the plant whence that emulsion came. *See* Pet. 12 n.3; Opp. 16. Moreover, although the government suggests that, even if the PCBs or other substances in Alcan's emulsion existed only at below-background levels, they could conceivably concentrate (say, if water in the emulsion evaporated) and reach above-background levels. *See id.* at 16 n.5. But the district court ultimately did not find that such concentration either did occur or was likely to occur, *see* C.A. App. 192 n.5, and this issue, too, could readily be addressed on remand.

the burden on the subsequent question of whether damages are divisible — would presumably lie not with the defendant, but rather with the government. *See, e.g.*, *Alcan*, 964 F.2d at 264. The underlying legal question whether a company could be subject to CERCLA liability for disposing of substances containing only trace amounts of manmade pollutants is therefore squarely before this Court, and *certiorari* should be granted to resolve it.

B. The Second Circuit Erred By Imposing Joint and Several CERCLA Liability Merely For Disposing Of Harmless Waste, On The Ground That It Could "Spread" Hazardous Substances In Waste Disposed Of By Others.

1. The government likewise offers little defense of the Second Circuit's further holding that generators may be held jointly and severally liable even if their waste contains only trace amounts of hazardous substances, simply because that waste might "spread" the hazardous substances disposed of by others. *See* Opp. 19-20. The government cites no cases for its assertion, antithetical to common sense, that the fact that waste has "mobilizing effects" precludes a generator from obtaining any apportionment of its liability. Instead, the government contends that "[p]etitioner overlooks the fact that it did not send a pure oil-water emulsion to the PAS and Fulton sites; rather, it sent a mixed industrial waste stream, consisting of water, oil, PCBs and other hazardous substances that, in itself, qualified as a hazardous substance." *Id.* at 20.[3] That contention, however, is entirely unresponsive. Even assuming that the presence of minimal amounts of PCBs in Alcan's waste sufficed to transform that waste into a "hazardous substance," the Second

[3] Although the government states that Alcan's emulsion contained "other hazardous substances" beyond PCBs, the district court did not find that any of those other hazardous substances, all of which were naturally occurring, existed in above-background levels. *See, e.g.*, 755 F. Supp. 531, 536-39 (N.D.N.Y. 1991); Pet. App. 35a-36a; C.A. App. 191 n.5.

Circuit effectively used the presence of those trace amounts as a bootstrap to subject Alcan to full joint and several liability without any possibility of apportionment. If the Second Circuit's decision is allowed to stand, full joint and several liability could attach even to companies that have disposed only of what are undeniably harmless substances.

Nor is there any question that the lower courts' refusal to apportion liability rested solely on their determination that the *non-hazardous* liquid substances in Alcan's emulsion — namely, water and oil — produced "mobilizing effects" on hazardous substances disposed of by others. *See* Pet. App. 12a-13a (Second Circuit); *id.* at 64a (district court) (noting that "a singularly non-toxic substance can physically interact with other substances and contribute to release and response costs"). There was no specific finding below that the alleged PCBs in Alcan's emulsion somehow interacted with any other hazardous substance in the emulsion, nor that the PCBs in Alcan's emulsion interacted consequentially with hazardous substances produced by others. *See* Pet. 13. The Second Circuit's legal conclusion that apportionment of liability is precluded whenever non-hazardous components of waste have "mobilizing effects" is therefore ripe for this Court's review.[4]

2. The government also misfires in contending that Alcan inaccurately characterizes the decision below by suggesting that it holds Alcan "entirely" liable for the cleanup costs of the two sites. *See* Opp. 21. In fact, we have already noted that Alcan did receive an offset for the share of liability paid by the settling defendants, even though the Second Circuit refused to further apportion Alcan's liability. *See, e.g.*, Pet. 1, 14. Nonetheless, the mere fact that Alcan's emulsion "constitute[d]

---

[4] As *amici* Washington Legal Foundation *et al.* note, it is questionable whether the fact that waste had "mobilizing effects" even increases the cost of recovery at all. Such waste "may have actually *diluted* the hazardous substances disposed of by others at the site, and thus[] ameliorated any environmental harm." Br. of Washington Legal Foundation *et al.* 16.

approximately 25 percent of the total volume of waste material" sent to the PAS site, Opp. 21, does not imply that Alcan should necessarily bear 25 percent of the liability. Such a slavishly volumetric approach is inappropriate where, as here, the generator's waste was never proven to be harmful or give rise to any remediation costs. *Cf. Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 937-38 (8th Cir. 1995) (rejecting strict volumetric approach on ground that "those who release substances that are more toxic are more responsible for the hazardous condition"). And the government does not deny that a future defendant in Alcan's position could be liable for most or even all cleanup costs, should the government choose either to settle too cheaply with other generators, or, in the extreme case, not to pursue any other generators at all.

3. Finally, the government claims that Alcan's assertions about the current breadth of CERCLA liability are based on mere "speculation and unsubstantiated anecdotes." Opp. 13. Even before the decision below, however, actual examples of CERCLA's breadth were not hard to find. *See, e.g.*, Ted Cilwick, *Big Polluters Find Way to Clean Up the Balance Sheet: Soak the Little Guy*, Salt Lake Trib., Nov. 8, 1992, at A10 (citing, *inter alia*, contribution action against pizza parlor for disposing of pizza boxes and other garbage). The Second Circuit's decision gives the government a green light to prosecute virtually anyone for violating CERCLA, and establishes a rule under which "liability is based more on a defendant's ability to pay * * * than on culpability." Cathleen Clark, *Should The Butcher, The Baker And The Candlestick Maker Be Held Responsible For Hazardous Waste?*, 1994 Utah L. Rev. 871, 874. Given these draconian implications, the Court's review is needed.

CONCLUSION

The petition for *certiorari* should be granted.

Respectfully submitted,

KENNETH W. STARR
ROBERT R. GASAWAY
KANNON K. SHANMUGAM
JOSEPH A. EISERT
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000

ROBERT H. BORK
6250 Ridge Street
McLean, VA 22101
(703) 288-1174

LAWRENCE A. SALIBRA, II
Counsel of Record
JOHN C. TILLMAN
MARK D. KINDT
ALCAN CORPORATION
6060 Parkland Boulevard
Mayfield Heights, OH 44124
(440) 423-6918

WILLIAM S. SESSIONS
HOLLAND & KNIGHT LLP
2099 Pennsylvania Avenue, N.W.
Washington, DC 20006
(202) 955-3000

December 2003